UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PFIZER INC.	)	
	)	
AND	)	**CASES 10-CA-175850**
	)	**07-CA-176035**
REBECCA LYNN OLVEY MARTIN, an individual	)	
	)	
AND	)	
	)	
JEFFREY J. REBENSTORF, an individual	)	
	)	

PFIZER INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Jonathan C. Fritts
David R. Broderdorf
Abbey Q. Keister
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202.739.5867
Facsimile: 202.739.3001
jonathan.fritts@morganlewis.com
david.broderdorf@morganlewis.com
abbey.keister@morganlewis.com

Counsel for Pfizer Inc.

Dated: August 8, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

INTRODUCTION

Pfizer Inc. ("Pfizer" or "the Company") excepts to the violations found by the Administrative Law Judge ("ALJ") concerning Pfizer's Mutual Arbitration and Class Waiver Agreement ("Arbitration Agreement"). First, the ALJ erroneously found that the Arbitration Agreement's class/collective action waiver provision violates Section 8(a)(1) of the Act. The ALJ's decision is contrary to the U.S. Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which held that arbitration agreements with a class/collective action waiver must be enforced according to their terms under the Federal Arbitration Act ("FAA") and, further, that the National Labor Relations Act ("NLRA") does not address the procedures for dispute resolution in court or arbitration and therefore does not override the commands of the FAA.

Second, the ALJ erroneously found that the confidentiality clause in Pfizer's Arbitration Agreement violates Section 8(a)(1) of the Act because, in his view, employees would reasonably understand it to prevent them from disclosing information related to their terms and conditions of employment, namely the Arbitration Agreement itself. This conclusion also contravenes the Supreme Court's holding in *Epic Systems* that the FAA mandates the enforcement of arbitration agreements, including "the rules under which that arbitration will be conducted," *Epic Sys.*, 138 S. Ct. at 1621, and the NLRA does not address the procedures for dispute resolution in court or arbitration. Confidentiality provisions are commonly used in arbitration agreements, supported by sound business and policy considerations, and regularly enforced under the FAA. The NLRA does not dictate a different result here. Moreover, Pfizer's confidentiality clause includes unambiguous language specifically disclaiming any intent to prohibit employees from engaging in protected activity under the NLRA, including discussions of wages, hours, or other terms and conditions of employment.

To the extent there is any doubt as to the meaning of the confidentiality clause (which there should not be), a dispute over its validity and enforceability under the FAA should be left to the courts and arbitrators, rather than the Board. The ALJ's decision oversteps the Board's authority to determine the enforceability of arbitration agreements governed by the FAA. This is a fundamental teaching of the Supreme Court's decision in *Epic Systems*.

Alternatively, if the confidentiality clause is analyzed as a work rule under the framework set out in *The Boeing Company*, 365 NLRB No. 154 (2017), it is a lawful Category 1 or Category 2 rule. The confidentiality clause specifically disclaims any intent to interfere with the exercise of Section 7 rights, including protected, concerted discussions of wages, hours, and working conditions. This broad disclaimer renders unreasonable any interpretation that would conflict with Section 7 rights, and any potential adverse impact on protected rights is outweighed by the legitimate justifications for the clause – justifications that benefit both the employer and the employee.

For all of these reasons, which are explained more fully below, the Board should reverse the ALJ's findings and conclusions with respect to the Arbitration Agreement's class/collective action waiver and confidentiality provisions.

STATEMENT OF FACTS

Pfizer is incorporated in the state of Delaware. Stipulation of Facts ("SOF") 1.[1] Pfizer employs approximately 32,000 employees in the United States, who are based at facilities located in 17 states and who work and transact business in all fifty states and the District of Columbia. SOF 2. On May 5, 2016, Pfizer sent an e-mail to employees informing them of the Arbitration Agreement, and instructing employees to read and acknowledge the Agreement.

[1] Prior to the November 4, 2016 hearing in this case, Pfizer and the General Counsel agreed to several stipulations of fact, which were memorialized and admitted into evidence as Joint Exhibit 1.

SOF 4; J. Ex. 1. The Arbitration Agreement applies to all Pfizer employees in the United States (except those who are covered by a collective bargaining agreement and those employed by a small subsidiary). SOF 8-9. Employees are not allowed to "opt out" of the Arbitration Agreement. They are bound to the Agreement as a condition of employment. SOF 10.

The Arbitration Agreement (J. Ex. 2) contains the following class/collective action waiver provision:

> a. Waiver of Class, Collective, and Representative Actions: To the maximum extent permitted by applicable law, the parties agree that no Covered Claims may be initiated or maintained on a class action, collective action, or representative action basis either in court or arbitration. This means that neither party may serve or participate in a class, collective, or representative action involving Covered Claims either in court or in arbitration. In addition, neither you nor the Company may participate as a plaintiff or claimant in a class, collective or representative action to the extent that the action asserts Covered Claims against you or the Company. Nothing in this Agreement will preclude you or the Company from testifying or providing information in a class action, collective action, or representative action.

SOF 6.

Pfizer's Arbitration Agreement also contains the following provision regarding the confidentiality of the arbitration process:

> e. Confidentiality: The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.] In all proceedings to confirm or vacate an award, the parties will cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

SOF 7.

The Arbitration Agreement specifically provides that it "shall be governed and interpreted in accordance with the FAA." J. Ex. 2 at § 6.f.

On May 9, 2016, Charging Party Rebecca Lynn Olvey Martin filed an unfair labor practice charge against Pfizer, which she amended on June 22, 2016 and July 21, 2016, in Case No. 10-CA-175850. On May 11, 2016, Charging Party Jeffrey J. Rebenstorf filed a charge against Pfizer in Case No. 07-CA-176035. On August 15, 2016, the Regional Director issued an order consolidating the complaints in these cases, and a notice of hearing. The parties submitted pre-hearing briefs and presented evidence at a November 4, 2016 hearing and then oral argument during a November 29, 2016 telephone conference call. The ALJ issued a bench decision on a December 1, 2016 conference call and a written decision on January 20, 2017, finding that Pfizer violated Section 8(a)(1) of the Act by requiring, as a condition of employment, the Arbitration Agreement with its class/collective action waiver and confidentiality provisions, but finding that Pfizer did not violate Section 8(a)(1) of the Act by threatening employees with discharge for refusing to sign the Arbitration Agreement. ALJ Decision, Appendix A, at 8–10.

ARGUMENT

I. Under the Supreme Court's Decision in *Epic Systems,* the Arbitration Agreement is Valid and Enforceable under the FAA [Exceptions 1–8, 28–37].

The ALJ erred in finding that the Arbitration Agreement's class and collective action waiver provision violates Section 8(a)(1) of the Act. ALJ Decision, at 2–4. The ALJ's conclusion contravenes the Supreme Court's recent holding in *Epic Systems* that arbitration agreements, including "the rules under which that arbitration will be conducted," *Epic Sys.*, 138 S. Ct. at 1621, must be enforced according to their terms under the FAA, and that the NLRA

does not address the procedures for dispute resolution in court or arbitration and therefore does not override the commands of the FAA:

> The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act.

Id. at 1632; *see also id.* ("Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." (internal citation omitted)); *Northrop Grumman*, 366 NLRB No. 147 (Aug. 2, 2018) (dismissing complaint in light of *Epic Systems*' holding that mandatory arbitration agreements that contain class/collective action waivers do not violate the NLRA and must be enforced as written pursuant to the FAA).

In light of the *Epic Systems* decision, the Board should reverse the ALJ's finding and conclusion that the Arbitration Agreement violates the Act due to its class and collective action waiver provision.

II. The Confidentiality Provision is Enforceable as Part and Parcel of the Arbitration Agreement Under the FAA [Exceptions 9–27, 38–42].

A. The ALJ's Decision Ignores the Strong Federal Policy Favoring Arbitration and the FAA's Mandate that Such Agreements Be Enforced According to Their Terms.

The FAA establishes "a liberal federal policy favoring arbitration agreements" and there is a well-established framework for reviewing and enforcing such agreements through the courts. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (discussing "the plain

meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts")).

Enacted in 1925 to combat the "judicial hostility to arbitration agreements," the FAA "place[s] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). *Epic Systems* specifically found that the FAA requires enforcement of the parties' chosen arbitration procedures: "Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys.*, 138 S. Ct. at 1621 (citing 9 U.S.C. §§ 3, 4). "Indeed, we have often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements in accordance to their terms, including . . . *the rules* under which that arbitration will be conducted." *Id.* (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (emphasis in original)). Similarly, the Court in *Epic Systems* made clear that "[u]nion organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures are usually left to other statutes and rules—not least . . . the Arbitration Act . . . ." *Id.* at 1627.

In light of the FAA's mandate that arbitration agreements be enforced according to their terms, including the rules and procedures for the arbitration, and the Supreme Court's ruling that the NLRA does not address the procedures to be used in an arbitration proceeding, the arbitration procedures contracted by the parties here, including the confidentiality clause, must be enforced in accordance with their terms. *Id.* at 1632; *see also Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1352 (11th Cir. 2014) ("The parties to the agreement we consider here have exercised their right

to structure their arbitration agreements as they see fit . . . . It falls on courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." (internal citations and quotations omitted)).

The confidentiality clause in Pfizer's Arbitration Agreement is part and parcel of the arbitration process. The Arbitration Agreement specifically provides – in the section immediately following the confidentiality clause – that it "shall be governed and interpreted in accordance with the FAA." J. Ex. 2 at § 6.f.

By its terms, the confidentiality clause is limited to the "arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award." SOF 7. Because the confidentiality provision is tailored to the arbitration process, it cannot be challenged without challenging the character of the Arbitration Agreement itself. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 176 (5th Cir. 2004) (noting that "the plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself"). Indeed, courts regularly find that such confidentiality clauses are valid and enforceable in an arbitration agreement. *See, e.g., Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 280 (3d Cir. 2004) (holding that the district court erred in finding confidentiality provisions unconscionable because "[e]ach side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party vis-a-vis the other in the dispute resolution process," "the confidentiality of the proceedings will not impede or burden in any way [the employee's] ability to obtain any relief to which she may be entitled," and confidentiality does not violate the public policy goals of either Title VII or the ADEA).

The FAA mandates enforcement of the Arbitration Agreement in accordance with its terms, and nothing in the NLRA overrides that mandate.

B. The Confidentiality Provision Must Be Construed Based on Common Law Contract Principles, Rather Than the NLRA.

Under the FAA, any challenge to the enforceability of an arbitration agreement's terms must be based on common law contract principles, rather than considerations that are peculiar the NLRA or any other statute. Specifically, the FAA's saving clause provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

As the Supreme Court held in *Epic Systems*, this is an "'equal-treatment' rule for arbitration agreements," in that the saving clause "recognizes only defenses that apply to 'any' contract." *Epic Sys.*, 138 S. Ct. at 1622 (citing *Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421, 1426 (2017)). The saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 364 (2011)). "The clause, however, offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *Concepcion*, 563 U.S. at 364).

For this reason, the Supreme Court held that even "[a]ssuming (but not granting)" that the arbitration agreements at issue in Epic Systems violated the NLRA, the agreements could not be invalidated under the savings clause because it would not be a defense that applies to "any" contract. *See Epic Sys. Corp.*, 138 S. Ct. at 1622 (holding that the FAA's savings clause "recognizes only defenses that apply to 'any' contract").

Instead, the enforceability of an arbitration agreement's confidentiality provision should be determined by courts that apply general principles of contract law, such as the doctrine of

unconscionability. *See, e.g.*, *Sanchez v. Carmax Auto Superstores Cal., LLC*, 224 Cal. App. 4th 398, 408 (2014) ("The second provision requiring confidentiality is not unconscionable. In regard to 'the fairness or desirability of a secrecy provision with respect to the parties themselves, . . . we see nothing unreasonable or prejudicial about it,' and it is not substantively unconscionable."); *Boatright v. Aegis Def. Servs., LLC*, 938 F. Supp. 2d 602, 609 (E.D. Va. 2013) ("In the absence of Delaware precedent, in light of the existence of a similar, default confidentiality requirement in the standard AAA rules, and because the Court concludes that the requirement will not impede or burden Plaintiffs or future claimants such that they cannot pursue and obtain relief, the Court finds that the confidentiality requirement here is not unconscionable."); *Bettencourt v. Brookdale Senior Living Communities Inc.*, No. 09-CV-1200-BR., 2010 WL 274331, at *7–8 (D. Or. Jan. 14, 2010) (finding the confidentiality clause enforceable under Oregon law and not void as against public policy).

Alternatively, courts may defer the interpretation of a confidentiality provision to the arbitrator who is charged with interpreting the agreement. *See, e.g.*, *Kilgore v. KeyBank Nat'l Ass'n*, 718 F.3d 1052, 1059 n. 9 (9th Cir. 2013) ("In any event, the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable."); *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1122 (C.D. Cal. 2015) (same).

In either case, the NLRB is not the proper forum for determining the enforceability of the confidentiality provision in Pfizer's Arbitration Agreement, nor does the NLRA provide the governing standard for interpreting that provision. *Epic Sys. Corp.*, 138 S. Ct. at 1629 ("Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought

to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.").

Based on the Supreme Court's decision in *Epic Systems*, the NLRA does not address the procedures for dispute resolution in court or arbitration, nor can it be applied through the FAA's savings clause. As such, there is no violation of the NLRA and any challenge to the Arbitration Agreement (including the confidentiality clause) must be addressed to the courts, or alternatively to the arbitrators who are charged with interpreting the Arbitration Agreement, based on general principles of contract law.

III. Even If Analyzed as a Work Rule to Be Interpreted by the Board Solely with Reference to the NLRA, the Confidentiality Clause is Lawful Under the *Boeing* Standard [Exceptions 9–27, 38–42].

Even if the confidentiality clause in the Arbitration Agreement is treated as a "work rule" to be interpreted solely with reference to the NLRA, the outcome is the same. The clause is lawful and enforceable under the standard set forth by the Board in *The Boeing Company*, 365 NLRB No. 154 (2017).

A. The Confidentiality Clause is Presumptively Lawful as a Category 1 Rule Because, When Reasonably Interpreted, It Does Not Infringe on NLRA Rights.

A work rule is presumptively lawful as a category 1 rule when "(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the

rule." *Boeing*, 365 NLRB No. 154, slip op. at 3-4. The confidentiality clause meets either prong.

1. *The Confidentiality Clause Does Not Interfere with the Exercise of Section 7 Rights.*

The confidentiality clause, when reasonably interpreted, only restricts the dissemination of "disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award …." SOF 7. The ALJ even acknowledged that a "reasonable" employee would not construe the inner-workings of a dispute resolution process as akin to their workplace or conditions of employment. *See* ALJ Decision, at 5 ("Litigation, whether before a judge or arbitrator, is out of the ordinary to all except the professional participants, and only attorneys, judges, and arbitrators would think of the courtroom as their 'workplace.'"); *see also id.* ("In other words, an employee reasonably would consider litigation (whether before an arbitrator or a judge) to be fundamentally different from what the employee did every day on the job.").

The ALJ erroneously concluded, however, that the confidentiality clause interferes with Section 7 rights because it "denies employees the ability to make a concerted protest to the public about irregularities and unfairness in the arbitration system the Respondent forced them to use." ALJ Decision, at 7. This is an unreasonable interpretation of the confidentiality clause. The clause does not deem the Arbitration Agreement itself to be confidential. It only treats a *proceeding* under the Agreement as confidential: "The parties shall maintain the confidential nature of the *arbitration proceeding and the award*, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award…." SOF 7 (emphasis added).

Thus, contrary to the ALJ's interpretation, the confidentiality clause does not prohibit employees from concertedly complaining about, or challenging, the Arbitration Agreement itself.

Indeed, the Arbitration Agreement explicitly recognizes employees' right to challenge the Agreement and dispels any fear that employees may be disciplined if they choose to do so. *See* J. Ex. 3, at 2 ("You have the right to challenge the validity of the terms and conditions of this Agreement on any grounds that may exist in law and equity, and the Company shall not discipline, discharge, or engage in any retaliatory actions against you in the event you choose to do so.").

2. *The Agreement's Disclaimer Renders Unreasonable an Interpretation that Would Conflict with Section 7 Rights.*

The ALJ's interpretation is all the more unreasonable because the Arbitration Agreement includes an express disclaimer of any interpretation that would prohibit employees from engaging in protected concerted activity or discussions of their terms and conditions of employment:

> [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.]

SOF 7.

The ALJ's interpretation of this disclaimer is unreasonable as well. The ALJ faulted Pfizer for not including the word "arbitration" in the disclaimer. ALJ Decision, at 5. As written, however, the disclaimer clearly permits discussions of "conditions of employment" and, as the ALJ acknowledged, the Arbitration Agreement itself is deemed to be a "condition of employment." *Id.* Thus, it is unreasonable to read the confidentiality provision to prohibit concerted discussion of the Arbitration Agreement itself, as opposed to the protecting the confidentiality of particular proceedings under the Agreement.

The ALJ's decision should be reversed because the confidentiality provision, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights. As such,

it is lawful under Category 1 of the *Boeing* standard. The disclaimer makes clear that employees are free to discuss issues relating to their working conditions, as well as to seek out witnesses and evidence in support of their claims. SOF 7 ("This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding."). Such confidentiality provisions are enforceable under general principles of contract law. *See Asher v. E! Entm't Television, LLC, No. CV 16-8919-RSWL-SSX*, 2017 WL 3578699, at *7–8 (C.D. Cal. Aug. 16, 2017) (finding that the confidentiality clause was not unconscionable under California law because it only required confidentiality of information "generated" and exchanged during arbitration, which would not "impede Plaintiff's discovery and investigation capabilities or contact with witnesses during litigation," and was "bilateral and allow[ed] disclosure when permitted by law or 'otherwise provided herein,' thus not fully creating a gag order on the parties as Plaintiff would argue"); *Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1258 (D. Kan. 2016) (refusing to strike a confidentiality clause as unenforceable because it would not impede the plaintiff's ability to advise potential witnesses about the lawsuit or engage in other activities necessary to support his claim); *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12CV2724 JLS JMA, 2013 WL 5472589, at *8 (S.D. Cal. Aug. 9, 2013) (upholding a confidentiality clause that prevented disclosure of any content exchanged during arbitration unless otherwise allowed by the law because it was not as broad as in a prior case where the plaintiff was expressly prohibited from contacting other employees "to assist in litigating or (arbitrating) an employee's case.").

3. *Alternatively, the Confidentiality Clause Is Lawful as a Category 1 Rule Because Any Potential Adverse Impact on Protected Rights is Outweighed by Legitimate Justifications.*

Alternatively, under Category 1 of the *Boeing* standard, the Board can uphold the facial validity of a rule that impacts Section 7 rights if the legitimate justification for the rule outweighs any potential adverse impact on NLRA rights. *Boeing*, 365 NLRB No. 154, slip op. at 4.

In this case, the confidentiality clause is lawful based on the legitimate interest in fostering trust and confidence in the dispute resolution process – without Pfizer or the employee being able to expose information *from within the arbitration proceeding* to the public. There is a well-established justification for confidentiality in alternative dispute resolution procedures. It is analogous to Federal Rule of Evidence 408, which protects from disclosure "[e]vidence of conduct or statements made in compromise negotiations." *St. George Warehouse, Inc.*, 349 NLRB 870, 872–74 (2007) (holding that comments made during mediation of unfair labor practice charges and collective bargaining disputes were inadmissible under Federal Rule of Evidence 408).

Indeed, courts have recognized the legitimate justifications for treating arbitration proceedings as confidential, as well as the fact that confidentiality can benefit both parties, not just employers. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (observing, in an employment case, that both sides might prefer the confidentiality of arbitration); *Asher*, 2017 WL 3578699, at *7–8 (finding that the confidentiality clause was not unconscionable under California law because, among other reasons, it was "designed to protect all parties in a dispute").

The Judicial Arbitration and Mediation Service ("JAMS"), the arbitration provider under Pfizer's Arbitration Agreement, also recognizes the benefits of confidentiality in arbitration proceedings in its rules. Rule 26, entitled Confidentiality and Privacy, provides:

> (a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

Rule 26, JAMS Employment Arbitration Rules.[2]

The NLRB itself has recognized the value of confidentiality in its own dispute resolution procedures. *See* Alternative Dispute Resolution Program, at https://www.nlrb.gov/what-we-do/decide-cases (last visited July 27, 2018) ("The Board will provide the parties with an experienced mediator, either a mediator with the Federal Mediation and Conciliation Service or the ADR program director, to facilitate *confidential* settlement discussions and explore resolution options that serve the parties' interests." (emphasis added)).

The ALJ erred by failing to consider the legitimate justifications for the confidentiality clause, which outweigh any theoretical adverse impact on Section 7 rights under Category 1.

B. If Analyzed as a Category 2 Rule, the Confidentiality Clause is Lawful Because Any Adverse Impact on NLRA-Protected Rights is Outweighed by Legitimate Justifications for the Rule.

Category 2 of the *Boeing* standard encompasses "rules that warrant individual scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." *Boeing*, 365 NLRB No. 154, slip op. at 4.

[2] Available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf.

The same legitimate justification for the confidentiality clause, as discussed above, renders the clause lawful under Category 2. Confidentiality clauses are commonly used in arbitration agreements because they are important to make the arbitration process work effectively as an alternative dispute resolution mechanism. Here, that legitimate justification outweighs any potential impact on conduct protected by the NLRA – especially because the clause contains an explicit disclaimer which recognizes employees' right to engage in that conduct. Therefore, the confidentiality clause is lawful under Category 2 because it strikes an appropriate balance between protecting the Company's legitimate objectives in designing an effective dispute resolution process while at the same time safeguarding employees' right to engage in protected, concerted activity under the NLRA.

CONCLUSION

For the foregoing reasons, Pfizer respectfully requests the Board grant Pfizer's Exceptions to the Administrative Law Judge's decision, reverse the finding that the Arbitration Agreement's class/collective action waiver and confidentiality provisions violate the Act, and dismiss the Consolidated Complaint in its entirety.

Date: August 8, 2018

Respectfully submitted,

By: /s/ Jonathan C. Fritts

Jonathan C. Fritts
David R. Broderdorf
Abbey Q. Keister
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202.739.5867
Facsimile: 202.739.3001
jonathan.fritts@morganlewis.com
david.broderdorf@morganlewis.com
abbey.keister@morganlewis.com

Counsel for Pfizer Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer's Brief in Support of Its Exceptions to the Administrative Law Judge's Decision have been served upon the following this 8th day of August 2018 by e-mail:

Steven M. Stastny, Esq.
P.O. Box 430052
Birmingham, AL 35243-1052
smstastny@gmail.com

Jeffrey J. Rebenstorf
23980 44th Ave.
Mattawan, MI 49071
ellenrebenstorf@gmail.com

Joseph W. Webb
Counsel for the General Counsel
National Labor Relations Board
Region 10 – Birmingham Resident Office
1130 22nd Street South
Ridge Park Place Suite 3400
Birmingham, Alabama 35205
Joseph.Webb@nlrb.gov

/s/ Jonathan C. Fritts
Jonathan C. Fritts